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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 367

W. C. JARRETT, L. DEVRIES, W. E. JOCELYN, ET ALS.,
Petitioners,

vs.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A CORPORATION, ALSO KNOWN AS NORFOLK HOUSING AUTHORITY,
Respondent

REPLY BRIEF FOR PETITIONERS

I

Not waiving any Assignment of Error treated in the Petition, but insisting thereon, yet wishing to avoid mere repetition, this reply brief will concentrate on the following errors:

The court erred in directing the summary judgment, in that the answer of the Housing Authority failed to show any statement of facts and figures, and stated a conclusion of law.

The brief for the Housing Authority quotes *Section 1410(b)* of *Title 42, United States Code Annotated* (Pages

8 and 9, Opposition Brief) and places therein three asterisks. That portion which is omitted, we respectfully submit, is the "meat of the cocoanut." The section is quoted in full, and the portion omitted is italized.

> "Annual contributions shall be strictly limited to the amounts and periods necessary, in the determination of the Authority, to assure the low-rent character of the housing projects involved. Toward this end the Authority may prescribe regulations fixing the maximum contributions available under different circumstances, giving consideration to cost, location, size, rent-paying ability of prospective tenants, or other factors bearing upon the amounts and periods of assistance needed to achieve and maintain low rentals. *Such regulations may provide for rates of contribution based upon development, acquisition or administration cost, number of dwelling units, number of persons housed, or other appropriate factors: Provided, That the fixed contribution payable annually under any contract shall in no case exceed a sum equal to the annual yield, at the going Federal rate of interest at the time such contract is made plus 1 per centum, upon the development or acquisition cost of the low-rent housing or slum-clearance project involved; And provided further, That all such annual contributions shall be used first to apply toward any payment of interest or principal on any loan due to the Authority from the public housing agency.*" (Italics ours.)

Section 1504 was then the formula for which the Housing Authority was compelled to adopt, which is as follows:

> "Any contract made for financial assistance under sections 1401-1430 of this title may be revised so as to provide that the project involved will be assisted for any of the purposes of sections 1501-1505 of this title. The Navy or War Department or the Authority, in the administration of any project developed for the purposes of sections 1501-1505 of this title, shall fix

rentals for persons engaged in national defense activities and their families which will be within their financial reach, and the Authority, in any contract for financial assistance or any lease of such a project, shall require the fixing of such rentals. Projects developed by the Navy or War Department, or developed or assisted by the Authority, for the purposes of sections 1501-1505 of this title shall not be subject to the elimination requirements of sections 1410(a) and 1411(a) of this title, or to any provisions of section 1409 of this title which would require any part of the development cost thereof to be met in any manner other than from funds loaned or furnished by the Authority. Funds expended for the purposes of sections 1501-1505 of this title shall be excluded in determining, for the purposes of section 1421(d) of this title, the amounts expended within each State. Except as otherwise provided in sections 1501-1505 of this title or as may be inconsistent with sections 1501-1505 of this title, all the provisions of title I of the United States Housing Act of 1937 shall apply to sections 1501-1505 of this title. During the period when the President determines that in any locality there is an acute need for housing to assure the availability of dwellings for persons engaged in national defense activities, dwellings in a project developed or assisted in said locality which are devoted to the purposes of providing housing for persons engaged in national defense activities shall not be subject to subsections (1) and (2) of section 1402 of this title, and during such period such projects shall be deemed projects of a low-rent character for the purposes of any of the applicable provisions in Title I of the United States Housing Act of 1937. June 28, 1940, c. 440, Title II, 204, 54 Stat. 683."

Thus it will be seen that the Office of Price Administration had nothing to do with the rejection or the approval of the rent.

II

The court erred in not directing the Housing Authority to take advantage of the subsidy. The Housing Authority admits that it did not take advantage of the subsidy (Third paragraph, page 15). The Housing Authority's brief admits that a government project (to use the words, page 18 of the brief) "Benmoreell Park—a somewhat similar development nearby" is a project in which sailors have not had to meet the two increases imposed upon them. This is the only comparable project to Merrimack Park in the entire State of Virginia, and the statute does not permit that mere chance of one sailor getting in Benmoreell would have to pay much less than one sailor in Merrimack Park, especially where both parties are drawing the same salary and from the same employer, the United States Navy. This subsidy (the intent and purpose of Congress) was to make comparable situations of this sort on an even keel.

In *Brand* v. *Chicago Housing Authority,* (C. C. A. 7, 1941) 120 F. 2d, 786, cited in the brief of the Housing Authority, is in fact authority for the petitioners in that the court therein decided that the Chicago Housing Authority was entirely proper and right in maintaining public housing for the benefit of low income individuals, and that the rents were based on a low income basis and not to permit tenants with large incomes to reside in said project. *A fortiori* in the case at bar, the very purpose was to have the Housing Authority obtain the subsidy in order that the rents may be on a level with comparable projects; to-wit, the Benmoreell Park.

The President's finding that the Norfolk area was one in which an emergency situation arose, demanded a different

application than any of the other projects operated by the Norfolk Housing Authority (Paragraph 3 of record, page 51). The Merrimack Park project was a class unto itself, solely for sailors and their families.

The Housing Authority's brief says that if they had appended an operating statement, it would have shown that there was no necessity for a subsidy (Page 15 of Housing Authority's brief). This, we respectfully submit, is one of the assignments of error, in that there was no operating statement or calculation made, and we respectfully submit that a subsidy is in order and should have been in order. It may be said that the Housing Authority operates other projects and is the Merrimack Park project separate and apart from the other projects? The President's Executive order defined this project as an exceptional one (Paragraph 3, record, page 51).

It is a far cry from justice and the intention of the statute to have one sailor whose financial circumstances are the same as any other sailor in the same United States Navy, to have to pay one rent in one government financed project, and another in another government financed project. Was it not the intention of the Congress to place the enlisted men on the same basis?

The answer, we respectfully submit, is in the affirmative, that both should be treated equally, especially when Section 1504 of the amended law authorizes the USHA to direct the loan limit of these projects from the original loan of 90% of the cost to 100%.

We submit that for the reasons stated in the petition, and some thereof emphasized in this brief, the petition for a writ of certiorari should be granted and judgment entered for the petitioners, or at least a new trial granted, with

pleadings and proceedings in an ordinary manner, so that justice may be done.

Respectfully submitted,

W. C. JARRETT,
L. DEVRIES,
W. E. JOCELYN, ET ALS.,
By LOUIS B. FINE,
Counsel.
(Of the Norfolk, Va. Bar.)

LOUIS B. FINE,
600 National Bank of Commerce Building, Norfolk 10, Virginia.

Copy of this brief has been delivered to the office of opposing counsel, Baird, White & Lanning, before filing.

LOUIS B. FINE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 367

W. C. JARRETT, L. DEVRIES, W. E. JOCELYN, ET ALS.,
Petitioners,

v.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a Corporation, also Known as Norfolk Housing Authority,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Petitioners as tenants of a public housing project called Merrimack Park laid complaint in the District Court at Norfolk, Virginia, for a declaratory judgment over the validity of two increases in their rentals. The first increase occurred in 1945 and evoked no suit. The second, two years later, produced the existing litigation with their landlord, Norfolk Redevelopment and Housing Authority, defendant-respondent herein. The

case is brought to this court on the order which sustained defendant's motion for summary judgment on the pleadings. (For the District and Circuit Court opinions, see 74 Fed. Supp. 585, and 169 Fed. 2nd 409).

The issues being thus dependant upon the pleadings, require no great factual elaboration in any event and none at this point beyond what is recited in the petition and supporting brief. We therefore turn at once to a consideration of the statutes which govern the focal points of the controversy. An understanding of what we would prefer to call the public housing formula will, it is believed, lead to a ready appreciation of the case.

ARGUMENT

The Statutes

Merrimack Park was conceived, designed, constructed, and is operated and owned by the Norfolk Redevelopment and Housing Authority. Since the object of the litigation is to review and upset the rentals put into effect by the Norfolk Housing Authority (as it is sometimes called), it is not amiss to consider in some minutia what that body is, who created it, how it operates, and what its rights and powers are.

The Virginia Housing Authorities Law was adopted by the Legislature in 1938. See Va. Code (Michie) Section 3145(1) et seq. The Act authorized each city and county to create a political subdivision of the Commonwealth to be known as "the Housing Authority" of the given city or county. The mechanics provided were that upon resolution of the city council or county board of supervisors finding and declaring that insanitary or

unsafe dwelling accommodations existed, or that there was a shortage of safe and sanitary accommodations for persons of low income (as defined), a housing authority for the given locality could begin to function. It thereupon devolved upon the mayor or board chairman to appoint five commissioners of the authority to serve without pay.

The law imposes upon these public corporations the primary responsibility for making investigations to determine where slum areas exist, and recommendations respecting slum clearance.

The Virginia Act accords housing authorities elaborate corporate powers. By subsection (8) they may borrow money, execute contracts, sue and be sued, acquire, lease, manage and dispose of property, and what is of importance here, "establish and revise the rents or charges therefor."

Subsection (9) is of particular significance in this case (R. p. 173). It charges the defendant housing authority (which was duly organized by resolution of the Norfolk City Council in 1940) to "manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals * * * at the lowest possible rates consistent with * * * providing decent, safe and sanitary dwelling accommodations * * *. To this end an authority shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which (together with all other available moneys (*sic*) * * * * from whatever source derived) will be sufficient to (a) meet the cost of, and to provide for, maintaining and operating the projects (including cost of insurance) and the adminis-

trative expenses of the authority; (b) to pay, as the same become due, the principal and interest on the bonds of the authority; and (c) to create * * * * a reserve * * * *".

The next section (10) limits authorities in the kind of tenants that may occupy their projects (R. p. 172). In general, they must be persons of low income (as defined) who are to be charged rentals *"within their financial reach."* The law then goes on to prohibit the renting of accommodations to families who have an aggregate annual income in excess of five times the rental (and in cases of families with three or more children, six times the rental). We thus see that a minimum or "floor" is placed under rentals so as to insure private enterprise against the kind of competition that would result from giving persons of modest income inordinately cheap housing.

Subsection (3) (j) defines persons of low income to "mean persons or families who lack the amount of income which is necessary (as determined by the authority undertaking the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without over-crowding." Here again, it may be observed, is a positive delineation of the power of a Virginia housing authority to decide not only who may occupy its projects, but what such persons can pay for occupancy, in its administrative discretion.

Virginia housing authorities also have the right of eminent domain, and may issue bonds to the public. Their bondholders are specifically authorized to proceed against them by way of mandamus to compel per-

formance of all the requirements of law (Subsection 17).

In 1942 the Virginia Legislature came along and broadened the functions of housing authorities. They were additionally empowered to develop housing accommodations for "persons engaged in national defense." In the same breath the amendment (Subsection 27) eliminated the rent "floors" imposed by subsections (10) and the second part of (9). "Persons engaged in national defense" may therefore be charged *less* than one-fifth of their income, but on the other hand, the same restriction carries over that rentals shall not be beyond their "financial reach." The difference between the two classes of tenants is important here: under the original scheme "persons of low income" could be expected to meet one scale of rentals at Merrimack Park, whereas under war-time conditions "persons engaged in national defense" obviously could afford quite a different scale. Necessarily, greater revenues were anticipated for and by local housing authorities over such a period of national emergency. Defense-housing was contemplated as a temporary affair, however, and at the end of the emergency it is provided that projects will return strictly to their "low-rent" status.

By State law we accordingly see that the defendant has the capacity to operate Merrimack Park as a housing project for service personnel, free and unhampered by the minimum rent limitations applicable to slum clearance projects. It is obligated, by statute, not to make a profit on the one hand, and on the other, to be self-sustaining and self-liquidating. Irrespective of profit or loss, however, the authority is governed by the

elementary requirement which forbids exaction of rates beyond the "financial reach" of either class of tenant. But naturally, a given rental within the "financial reach" of a chief petty officer having longevity allowances may be quite another thing for a second class seaman just out of boot camp, even though both may occupy similar quarters in the same housing project. Adjustment of rates in such disproportionate circumstances is, as we shall see, arranged through a so-called hardship formula, hereafter mentioned.

The State law is devoid of limitation on the date of maturity of bond issues. To that extent complete latitude is left to the commissioners in determining sinking fund and reserve provisions for their securities. Doubtless it was contemplated that financial assistance extended from Washington would be conditioned upon terms, in this connection, agreeable to the Federal agency administering the funds. At all events, by State law local housing authorities are free to pay off their debts as rapidly as they see fit and are able to do so within the other limits of law previously discussed. The war boom manifestly advantaged them in this connection: they were enabled (if not obliged) to rent accommodations in many projects to persons of greater financial resources; the increased "financial reach" of those persons consequently admitted of more latitude to housing authorities in the realization of revenues from rent. But increased revenues over the war period will not enable the Norfolk Authority to accelerate its amoritization program, which remains at 60 years (Answer, R. p. 42). As a matter of fact, they will hardly allow it to keep up with the staggering load of

maintenance brought about by the current monetary inflation. It is no secret that such things as refrigerators, for instance, will cost three times their original 1940 lot price to the Authority. Reserve accounts for such replacements have had to be, of course, adjusted accordingly.

The Norfolk Authority operates several projects in the city and it may be observed that the responsibilities resting upon the five commissioners are not inconsiderable. By law, they must play their cards close to the chest—no profit, and no loss. The prediction and calculation of future operating costs, future debt service, the money market, the general economy of the country, and other such matters are manifestly all a part of their charge and burden, not to mention wisdom. Just how our housing authorities manage to operate without loss on modest rentals is, of course, where the Federal government steps into the picture. But before turning to the Federal statutes, it is well to note in passing that the communities themselves participate in and bear a part of the cost. As a political subdivision of the Commonwealth the Norfolk Authority is tax-free. Under subsection (21) communities are authorized in effect to meet the requirement of Federal law (Title 42 U. S. Code Ann. Sec. 1410(a)) that an amount equal to at least 20% of the annual Federal subsidy be contributed in the form of cash or tax remissions and exemptions.

The Virginia Housing Authorities Act of 1938 was but a sequel to the United States Housing Act of 1937.

In this legislation (42 USCA Section 1401 et seq.) Congress created the United States Housing Authority

to prime the pump for slum clearance on a local scale. The Federal Authority was authorized, among other things, to make loans to local public housing authorities and annual "contributions", or to utilize the means of capital grants—all, of course, for specific projects approved by the government. (This latter method, we understand, has never been put to use).

The government's approval under this original legislation was limited strictly to slum clearance work. That is to say, section 1402 defines "low rent housing" to mean dwellings available only for "families of low income" whose net income must not exceed five times the rental, or in cases of families with three or more dependents, not more than six times the rental. By the same token as the Virginia Act, "families of low income" are defined to be persons in the lowest income group who cannot afford to pay enough rent to cause private enterprise to build an adequate supply of safe and sanitary homes.

Section 1409 lays down a loan limit of 90% of the approved cost of a project; it prescribes the minimum interest rate; and then completes the scheme by requiring that all loans "shall be secured in such manner, and shall be repaid within such period not exceeding 60 years, *as may be deemed advisible by the Authority*" (Italics ours).

The heart of the public housing formula is expressed in section 1410 (b):

> "Annual contributions shall be strictly limited to the amounts and periods necessary, *in the determination of the Authority,* to assure the low-rent character of the housing projects involved. Toward

this end the Authority may prescribe regulations fixing the maximum contributions available under different circumstances, giving consideration to cost, location, size, *rent-paying ability of prospective tenants*, or other factors bearing upon the amounts and periods of assistance needed to achieve and maintain low rentals * * * Provided, That the fixed contribution payable annually under any contract shall in no case exceed a sum equal to" (the going interest rate to the government, plus 1 per cent). (Italics ours.)

When war overtook the country the scope of the U. S. Housing Authority was broadened. Utilizing the facilities of an existing agency, Congress in 1940 directed the USHA to turn its attention to the growing demand for housing of persons engaged in national defense. In localities where the President determined that an acute need existed—and Norfolk was obviously one of those places where the needs were most pressing—the Authority was told to step in and "develop" or "administer" or "extend financial assistance" to local authorities. The Navy and Army could likewise call for its cooperation and assistance.

Section 1504 of the amended law goes further and authorizes the USHA to amend its contracts with local housing authorities so as to divert embryo slum clearance projects into dwellings for the Army, Navy and defense workers. When assistance in that direction is given, the loan limit of 90% of cost is increased to 100%; moreover, the rental limitations imposed by the government (that is, either the Army or Navy if owned by either, or USHA if owned by a local authority) must fix, or require the fixing of, rentals

"within the financial reach" of this new class of tenants. In other words, and as in the case of the Virginia statute, the rental minimum (one-fifth) was eliminated for defense workers but the maximum remained his "financial reach."

The Housing Authority of the government is given —and required to exercise—a measure of control over the projects it sponsors. Various devices are spelled out in the statutes to give it the power necessary to compel a project to be returned to the low-rent scheme: in specified events of default there are remedies such as termination of subsidy, automatic increase in interest rates, and of course, foreclosure.

The Contract

The Norfolk Authority's contract for financial assistance from the government is a lengthy document but only the general tenor and theory of the arrangement need explanation here.

At first glance we see that the project in question is not intended for slum clearance during the emergency (Par. 6, R. p. 53). Quite to the contrary, we observe the recital of the President's finding that Norfolk is an area wherein an acute shortage of dwellings exists for defense personnel, and that Merrimack Park is an approved type of project for that purpose (Par. 3, R. p. 51). Therefore the Federal Public Housing Authority (a consolidated agency which has taken over the functions of the USHA by presidential proclamation) commits itself in the contract to make annual contributions in aid of carrying on the project. And exactly how the project is to be carried on, or managed,

is the subject of the voluminous Part II or supplement to the contract, which goes into great detail concerning operational matters such as the all-important subject of rent. Sections 3.06, 3.07 and 4.05 of Part II are especially pertinent here (R. pp. 103 and 37). (Parenthetically, the index printed at the beginning of the contract may be of assistance to the court in perusing and correlating its provisions.)

It is quite apparent that in the scheme of things set forth in these sections of the contract, the government stands to benefit from successful operation of a project. Its "contribution" or subsidy is not fixed: only an annual maximum is prescribed on a sliding scale (R. p. 57). To the extent solely of closing the gap between profit and loss does the government participate by sudsidy; if successful management narrows the gap or closes it, no subsidy is required and FPHA is the happier. Successful management, however, may not exceed the bounds laid down by law. These bounds, as the court will see, are incorporated in much detail into the government contract. Hence the party most directly concerned—the government—cannot lawfully or contractually permit a local authority to depart from the "Low-Rent Character of the Project." (See R. pp. 133-4-5).

To make the point abundantly plain, Judge Barksdale in the trial court quoted from Section 5.03 of Part II as follows:

> " 'To assure that the annual contributions will be strictly limited to the amounts and periods necessary, and in view of the fact that it is anticipated that *no annual contributions may actually be neces-*

sary during the War Housing Period, the contribution to be paid on each Annual Contribution Date shall be calculated as follows: * * *" (Italics mine.)"

Why, it may be queried, are no contributions from the government anticipated over the War Housing Period? We have already seen that contributions are highly contingent—dependent upon need. As intimated above, the "financial reach" of war-housing tenants was expected to be such that rentals alone would carry the project. Only to the extent that they do not, does the need for subsidy arise. And the government, holding the purse-strings, is naturally to be the final arbiter on this question of need.

In addition to the defendant's word, the record further contains a statement under oath from FPHA that the contract at bar is in all respects being met by both parties. Beyond this, we have before us the uncontroverted fact that the scale of rentals in effect at Merrimack Park—including the two increases therein—have been submitted in advance to and approved by both FPHA and OPA (R. pp. 24, 33 and 34).

In approving the scale of rentals, the government was obliged to rely upon facts and administrative determinations certified by the local authority respecting the financial ability of its tenants. Not only do we see that it certified the application of a so-called "hardship formula" whenever some family might be unable to meet the new scale (R. pp. 25 and 31), but the Court will observe that within its four corners the record is bare of claim that the rent of a single one of the plaintiffs is beyond his financial reach. Such being

the fact, it is difficult to perceive how present tenants can justifiably complain that future tenants may eventually pay less rent than they. The whole set-up contemplates that, as the tenants well know, at the end of the defense-housing period they will all become ineligible for occupancy and persons of less means will take their places—with rentals correspondingly reduced and the subsidy commencing to take effect.

It would be, perhaps, treading on the merits of the case to explain why the rent was increased at Merrimack Park. Appellee's answer, nevertheless, explains that up until 1947 the Authority had been taking advantage of low interest rates by making its borrowings on short-term notes. The time was rapidly approaching, in the then estimation of the five commissioners, when the money market would drop; therefore if savings below the government's proffered interest rate of 2½% were to be gained, long-term bonds should promptly be offered the public. The immediate difference in interest charges would approximate two percent, or $40,000, which is $6.00 per month per unit at Merrimack Park. As the actual raise averaged $7.52 per unit, the Court can appreciate how closely the Authority calculated the enormously increased operating and maintenance costs for the 500 dwelling units in question.

It so happens that subsequent events have fully borne out the judgment of the commissioners on the money market. So serious an undertaking, however, as the permanent financing of the project has for obvious reasons been held in abeyance pending the outcome of this suit. Meanwhile the money market shows no signs of departing from its present trend, and the refinancing

operation will undoubtedly become more expensive than had been thought a year and a half ago.

The Case at Bar

Housing authorities have a wide discretion—and are in duty bound—to adjust rentals from time to time in the light of changing conditions

It is perfectly true that the housing shortage is a national problem; and admittedly, the claims and contentions made in this litigation can find no counterpart in a decided case. But this is not to say that the instant appeal raises any more significant, or more novel, question than the right of a local housing authority to raise its schedule of rentals, once set. Indeed, the petition appears to postulate the whole argument on the rather amazing premise that public housing rentals should be uniform throughout the nation.

Rationalizing the contention as best we may, it seems to be founded upon two ideas. First, it is said that law requires the government to grant, and local authorities to demand, the maximum subsidy at all times, willy-nilly. Evidently to round out a thesis, it is next claimed that the 60-year period prescribed in the statute as the limit within which local authorities must contract to repay construction loans, is a minimum limit, or rather a fixed term, instead of an outside figure or maximum.

That the statutes impose no such radical absolute as compulsory subsidy, requires no elaboration beyond what was said by Judge Parker in the Court of Appeals below. Nor was Judge Barksdale in the District Court able to read into the Housing Act an ironclad 60-year

amortization period. What counsel really means to complain about here is that, as the law only prescribes a maximum period of 60 years, it is theoretically possible for local authorities to adopt a much shorter period. The feasibility of a particular authority arranging a somewhat shorter term was, no doubt, visualized by Congress, but it is perfectly apparent that the legislation was surrounded by adequate safeguards to prevent this feature from being abused to the point of interfering with the low-rent character of a project. The fact of the matter is that the congressional mandate is quite explicit (see section 1410(b) quoted at page 8 of this brief). At all events, however, respondent's sworn answer alleging that a 60-year sinking fund had been set up for Merrimack Park, and approved by FPHA, renders the point moot.

The remaining contention is to the effect that an issue of fact was raised on the pleadings, hence the motion for summary judgment should not have been sustained. If we analyze the argument correctly, it follows the notion that respondent's answer (R. p. 40) resorted to asseverating mere conclusions, whereas if calculations and operating statements had been appended, the absence of subsidy would have become apparent and, what is more, respondent's affirmative denial of making a profit on the project could have been arithmetically tested.

It has all along been conceded that the subsidy is not now being received for Merrimack Park.

On the basis of the rents disclosed in this record, it would be difficult to take seriously an outright charge that Merrimack Park is producing a profit, even with

subsidy. The largest apartments, having four bedrooms, now bring $51 per month, including utilities—*which is one dollar and seventy cents a day.* Be that as it may, no such charge was advanced in the petitioners' complaint. A reference to that paper shows that the whole theory of the case rested upon misconceptions of the public housing formula long since discarded. Unfortunately, the tenants started off by thinking that the Navy had some control over their situation and could lawfully impose its schedule of rentals on Merrimack Park (Complaint, R. p. 64). Unfortunately, too, they seem to have misread State and Federal law into fixing a maximum rental of one-fifth of their income (R. p. 63), whereas it is actually a minimum. Such a minimum was inserted into the law for reasons manifestly other than to protect tenants; in fact, it can frequently work a hardship upon them. Brand et al v. Chicago Housing Authority (CCA 7, 1941), 120 Fed. (2d) 786, concerns very much the reverse of the situation here. In that case the low-rent tenant was protesting a *reduction* because it had the effect, under this provision of law, of rendering him ineligible for occupancy. His rent had suddenly been reduced to less than one-fifth of his income. The tenant's eviction on that account was upheld.

Aside from the now abandoned catch-all allegation respecting utilities and service charges, the complaint was so framed as almost to invite demurrer. Instead of any specific criticism of the manner and method of operating Merrimack Park, the pleader relied upon allegations that rentals are "fixed by law" or "fixed by the Navy" (R. p. 63), that "the defendant contends it has the right to raise rents" whereas "plaintiffs aver

they are subject to" certain features of the law claimed to standardize rentals (R. p. 64). In conclusion a declaratory judgment is prayed, holding illegal the increases and, by way of consequential relief, awarding judgment for the overcharges.

If there is one thing as to which the housing acts give tenants, as such, a right to complain, it is the specific provision which holds down rentals to their financial reach or capacity to pay. But not one tenant of Merrimack Park has seen fit to vouch his financial circumstances on such a contention. This is not just because of a liberal application of the so-called hardship formula at Merrimack Park (R. pp. 24, 25, 31, 32), but for the very compelling reason that the new schedule of rentals has been found by OPA to be well within the standard for comparable accommodations in the city of Norfolk (R. p. 34). This, of itself, should dispel counsel's wild assertion that the rents have been increased "almost 90%".

Facing these facts, it is no wonder that the petitioners fall back on the time-worn strategy of insinuating that the Authority's books and financial statements might not show a necessity for increasing revenues. In demanding the right to review the Authority's administrative determinations, they evidently find it difficult to accept a denial of that right without a co-extensive demonstration of what its concession would entail.

Fishing expeditions of this sort have been the subject of frequent condemnation by the courts. Nowhere is the law better stated than in the closing paragraph of Judge Parker's opinion, as follows (R. p. 178):

"The fixing of rentals was a matter intrusted by law to (fol. 97) the discretion of the defendant authority, not to the courts (Brand v. Chicago Housing Authority, 7 Cir., 120 F. 2d 786, 788). The authority was clothed with the duty of fixing rents in the light of the standards prescribed by the statutes and contract referred to; and this, of course, required the exercise of a high order of business judgment and a wide discretion. The courts have no more power to interfere with the exercise of this discretion than with the discretion vested in a public service commission to fix rates. Only where the authority has transcended its legal powers, violated rules of law or abused its discretion may the courts intervene."

The real motivation behind this litigation is touched upon by Judge Barksdale in the District Court. For a time Merrimack Park voluntarily followed the rent schedule which the Navy put into effect in its own project, Benmoreell Park—a somewhat similar development nearby. For reasons which the Navy apparently could ignore, the Norfolk Authority found it necessary to depart from an equal footing with Benmoreell in 1945. When in 1947 a further departure was put into effect, this was evidently too much for mutual Navy friends in the two projects to comprehend. Their lack of understanding, of course, lies in their understandable failure to appreciate that Benmoreell is government-owned and owes no debt; besides which, the Navy is under no compunction to make Benmoreell break even, particularly at the expense of the morale of its people.

CONCLUSION

Having traveled rather circuitously, we thus get back to the essential feature of the case, which is that, far from giving the tenants in a defense housing project a guaranteed or nation-wide scale of rentals, the law imposes on all authorities which partake of the public till the responsibility, first of all, for making their projects a financial success in their own varying communities. The statutes rest upon and in these housing agencies a necessarily wide scope of discretion and decision. Indeed, the whole theme of public housing is that the government will step in and foot the bill if and only if local agencies are unable to make both ends meet. This surely is a far cry from according the recipients of public housing—as these tenants are—a right to participate in the determination of rentals. We do not suppose that this court or any other would lightly assume to substitute its opinion for the collective judgment of the five commissioners, in a matter of providing enough income to meet all the obligations of what is manifestly a sizeable business undertaking. Especially so, when it is plain that tenants must contribute their share—up to a point—irrespective of profit or loss*. There being no controversy over exceeding that point, the complaint in this case amounts to no more than wishful thinking.

This brief has been designed to reduce the somewhat complicated public housing formula to the plainest terms, in an effort to demonstrate the cardinal

* We have several times used the expression "profit and loss" in this brief. It is not meant to convey what actually does not exist—a true profit. Our intention is merely to signify the difference between breaking even and sustaining a deficit in operations.

principle that it really subsidizes the tenant only when and to the extent he needs subsidizing. No matter how much he may like the idea of subsidization, he has not shown any necessity for increasing the public burden here. So long as he is able to pay—within the limitations on his resources prescribed by law—a rental which will sustain the project in which he lives, then the subsidy is rightfully minimized and the tenant has no just cause of complaint. Quite palpably, it is up to the local authority and the government jointly to decide, within the bounds of discretion, how much subsidy is needed. To repeat, there has been no suggestion of an abuse of discretion on the part of either in this connection.

The judgment of the courts below admits of no other conclusion on the public housing formula, and should not be disturbed.

Respectfully submitted,

EDWARD R. BAIRD,
GEORGE M. LANNING,
(Of the Norfolk, Va. Bar)
Counsel for Respondent.

BAIRD, WHITE & LANNING
1119 National Bank of Commerce Bldg.
Norfolk 10, Virginia

Copies of this brief have been delivered to the office of opposing counsel, Louis B. Fine, Esq., at Norfolk, before filing.

EDWARD R. BAIRD